The Washington Post

AN INDEPENDENT NEWSPAPER · WEDNESDAY, MAY 24, 1972 PAGE A14

The Supreme Court and Trial by Jury

The first thing that ought to be said about the Supreme Court's decision upholding the constitutionality of non-unanimous jury verdicts in state criminal cases is that it is not new. As long ago as 1900, the Court said states could approve non-unanimous verdicts if they wanted to and at least six states have. But once that much is said about the Court's decision, little remains that might be considered favorable. The logic of the argument and the lessons of history seem to us to come down heavily on the side of the dissenters, and the implications of the decision are a little bit terrifying.

Since the Court first spoke on this question at the turn of the century, many things have changed both in the country and in the law. It is those changes which make the decision in this case seem so strange. For example, there is now a majority on the Court for these three propositions: that the Sixth Amendment's guarantee of a jury trial in criminal cases applies the same way in state courts that it applies in federal courts; that this guarantee requires a unanimous verdict in federal courts; and that the same guarantee does not require a unanimous verdict in state courts.

When the Supreme Court first spoke on this matter in state cases, the first of these propositions had not been established. None of the guarantees in the Bill of Rights had then been applied to the states by the Court, although most of them now have been. The jury trial guarantee was applied for the first time in 1968, and the premise underlying the opinions of eight of the nine justices in this week's case is that it applies in state courts *exactly* as it applies in federal courts. Given that premise and the Court's long history of insisting upon unanimous verdicts in federal courts, it had seemed a foregone conclusion that non-unanimous verdicts in state cases would be held unconstitutional.

Nevertheless, four members of the Court—Chief Justice Burger and Associate Justices White, Blackmun and Rehnquist—indicated a readiness to overturn at least a half dozen precedents in order to sustain split-jury verdicts. The logic of Justice White's opinion for himself and the other three requires that the non-unanimous rule be sustained in federal, as well as state, cases. Four other members of the Court—Justices Douglas, Brennan, Stewart and Marshall—argued the matter the other way and dissented squarely from Monday's decision. That left the crucial vote in the hands of Justice Powell who rejected the idea that the jury trial guarantee must apply the same way in both sets of courts. He agreed with the logic of Justice White that unanimous verdicts are not fundamental to the function of a jury so he voted to uphold them in state courts. But he was not prepared to dump 200 years of history and abandon them in the federal courts.

The basic rationale for unanimous verdicts, outside of history, rests in the requirement that prosecutors prove guilt beyond a reasonable doubt. If nine jurors believe a man is guilty beyond a reasonable doubt and three believe he is not, has the prosecution met that burden? The Court's majority says yes. But if that is so, what about a vote of eight to four or seven to five or, since 12-member juries are no longer required, three to two or two to one? Once the line of unanimity is broken, it seems to us, another stopping place is hard to define, despite Justice White's statement that "a substantial majority" of jurors must be convinced of guilt and Justice Blackmun's comment that a seven to five system "would afford me great difficulty."

The other rationale for unanimous verdicts lies in the role of the jury in representing a cross-section of a community. It doesn't do much good to insist that minorities be represented on juries if the views of minority jurors can be ignored once the jury retires to consider a verdict.

No one can predict with any accuracy what the impact of the Court's decision will be. For one thing, little is known about how juries really operate. The most reliable study of jury behavior indicates that a nine to three rule would produce 44 convictions and 12 acquittals out of every 100 cases where a unanimous verdict is is not possible. Just as important, it seems to us, may be the impact of majority rule on jury deliberations themselves. The need to convince the remaining three or two or one holdouts has substantially modified many jury verdicts, some for the better and some for the worse. It has also forced extremely careful analysis of the evidence in cases that might otherwise end quickly, and without much analysis, on an original nine to three ballot.

Of course, before the non-unanimous verdict becomes widespread most states will have to change either their constitutions or their existing laws. Before doing so, both legislators and voters ought to consider that all the Court has said is that non-unanimous jury verdicts are constitutional—not that such verdicts are desirable. Indeed, Justice Blackmun remarked that if he were in a legislature, he would oppose non-unanimous juries as a matter of policy. The rule that juries should be unanimous is an old one, older in Anglo-American law than the Constitution or the United States. It is not a rule that ought to be abandoned without the most sober kind of consideration, just because the Supreme Court says it is permissible under the Constitution to do so.